BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LOUIS E. SHEPARD	)	
Claimant	)	
VS.	)	
	)	Docket No. 172,165
OVERNITE TRANSPORTATION COMPANY	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appeals from the June 23, 1997, Award entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument on November 18, 1997, in Kansas City, Kansas.

APPEARANCES

Claimant appeared by his attorney, George E. Mallon of Kansas City, Kansas. Respondent appeared by its attorney, James E. Martin of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

(1) Whether certain testimony and exhibits offered by respondent and considered by the Administrative Law Judge, over the objections by claimant, should be excluded from evidence.

(2) The nature and extent of claimant's injury and disability.

(3) The compensation due claimant, specifically, whether the Administrative Law Judge erred in his award calculation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and having considered the briefs and arguments of the parties, the Appeals Board finds that the Award entered by the Administrative Law Judge should be modified.

(1) Respondent hired The Kansas City Agency, Inc. to conduct surveillance on claimant. The surveillance included videotaping certain activities performed by claimant. Two investigators for The Kansas City Agency, Inc. testified and videotapes were introduced and offered as exhibits to the depositions of the two investigators, namely John Recar and David Lee. The depositions of both were taken on March 19, 1997, at the office of The Kansas City Agency, Inc. Mr. Recar testified that he had been employed by The Kansas City Agency, Inc. as a field investigator. In that capacity, he performed surveillance on claimant for a total of five days: specifically, December 21, 1992; December 22, 1992; March 14, 1995; March 22, 1995; and April 18, 1995. In the course of that surveillance, Mr. Recar took videotapes and made written reports. Claimant's counsel objected to any opinions contained in the report. Recar Deposition Exhibit No. 1 was marked but was not offered as an exhibit and is not attached to the original transcript of the deposition of John Recar. As it was not made a part of the record in this case, the claimant's objections to same are moot.

Respondent's counsel asked Mr. Recar to describe what he observed of claimant on December 21 and 22, 1992. Claimant's counsel objected to the question "because it calls obviously for his opinions." Claimant's objection on that basis is overruled. Claimant's counsel also objected on the basis that all of Mr. Recar's observations of claimant were on the videotapes. Mr. Recar agreed that whatever he observed of the claimant was on the tapes. Accordingly, claimant's objection to the witness describing what is on the videotapes is sustained. Once a foundation for the videotapes has been laid and the claimant is identified, the videotapes speak for themselves.

Mr. Recar identified Deposition Exhibit No. 5 as a videotape of the activities he observed claimant perform on December 21 and 22, 1992. Claimant's counsel objected to all of the videotapes on the basis that they were not revealed to him before the closing of the plaintiff's case and because copies were not produced to claimant's counsel prior to the deposition.

Claimant's counsel was first advised of the existence of the videotapes at the time that respondent's counsel scheduled the depositions of the two investigators. However, claimant's counsel admits that he had never before inquired of respondent as to whether respondent had any surveillance videotapes and, for that matter, had not made a request for respondent to identify any of its proposed exhibits. There was no discovery order in

place. Accordingly, respondent was under no obligation to disclose or produce the videotapes prior to its serving notice of its intent to take the depositions of the investigators.

In response to claimant's counsel's objection to not being furnished a copy of the videotapes prior to the deposition, respondent's counsel introduced Recar Deposition Exhibit No. 8 which was a copy of a February 12, 1997, letter by respondent's counsel to claimant's counsel. That letter confirmed the substance of their earlier telephone conversation, including respondent's offer to provide copies of the videotapes if claimant would pay for the copying. Otherwise, respondent's counsel would make the videotapes available for viewing at his office. Respondent's conduct conformed to the procedure contained in K.S.A. 60-230(f). Although at oral argument before the Appeals Board, counsel for claimant contended that payment for the copying was not the issue but rather the issue was which party was to be responsible for performing the act of copying the videotapes, it appears from the correspondence and statements made during the Recar deposition that, in fact, the issue was who would bear the cost of copying the videotapes. The Appeals Board notes that the cost of reproducing videotapes would have fallen on respondent under K.A.R. 51-2-4. When respondent offered the videotapes as exhibits to the evidentiary depositions of John Recar and David Lee, the original videotapes became a part of the record before the Administrative Law Judge. Absent some agreement to the contrary, copies of the videotapes would have to be made to be attached to the copies of the depositions going to counsel. The Administrative Law Judge ordered the reporter fees and transcript costs assessed against the respondent in his Award. The cost of reproducing exhibits to the depositions would have been part of the fee charged by the reporter.

Claimant's counsel asks for a ruling from the Appeals Board on the question of at whose expense the videotapes should have been copied. Therefore, and in the interest of expediting the exchange of information between parties, the Appeals Board finds that the cost of reproducing a videotape that is to be offered as an exhibit to a deposition should initially be borne by the respondent under K.A.R. 51-2-4. The cost of producing documents outside a deposition or hearing should generally be borne by the party requesting same. *See* K.S.A. 44-554; K.S.A. 44-555; and K.S.A. 60-245(b).

Claimant's counsel also objected to the admissibility of the videotapes based upon the videotapes being improper impeachment evidence. Claimant argued that if the videotapes were intended to impeach the testimony of claimant, then they must be introduced while claimant is testifying. This objection is overruled. Evidence that is intended to contradict testimony given by claimant may be introduced at any time, including during the respondent's case in chief. Evidence tending to impeach the credibility of a witness need not be introduced during said witness' testimony. *See* generally K.S.A. 60-420; State v Beans, 247 Kan. 343, 800 P.2d 145 (1990). Claimant's counsel could have requested an opportunity to put the claimant back on to answer questions raised during respondent's case in chief but failed to do so. Claimant made no request to have his terminal date extended in order to offer rebuttal testimony. Claimant's argument that he was denied an opportunity to rebut the videotapes is without merit.

Recar Deposition Exhibit No. 2 is the investigator's written report concerning his surveillance of claimant on March 14, 1995. The videotape of that surveillance was marked Deposition Exhibit No. 6.

Mr. Recar conducted surveillance on March 22, 1995, but did not observe claimant on that date. His report, marked Deposition Exhibit No. 3, so indicated and no videotape was made that day. The surveillance conducted on April 18, 1995, is summarized in the report marked Deposition Exhibit No. 4 and the videotape taken on that date was identified and marked as Deposition Exhibit No. 7. At page 17 of the Recar Deposition the exhibits numbered 1 through 7 were offered by respondent. Claimant's counsel objected to all seven exhibits for the reasons previously stated. Counsel for claimant refused to view the videotapes at the deposition and refused to cross-examine Mr. Recar concerning the exhibits beyond the voir dire which claimant's counsel conducted during the respondent's direct examination. When the videotapes were played for purposes of identification by the witness, claimant's counsel refused to stay and left the deposition. Respondent's counsel withdrew Exhibit Nos. 1 through 4, stating, "They were offered simply so Mr. Mallon would have the opportunity to review them and cross-examine on any activities that are contained therein." Claimant's counsel was reminded that a second deposition was scheduled, that of David Lee. However, claimant's counsel declined to participate in that deposition.

Respondent's counsel should have produced a copy of the investigators' reports and surveillance videotapes to claimant's counsel prior to the depositions, if requested to do so. The videotapes are, nevertheless, admitted. Claimant's counsel was afforded an opportunity both prior to and during the depositions to view the videotapes, but he declined to afford himself of those opportunities. Claimant has not shown any prejudice resulted from not having the videotapes and reports sooner. Claimant's counsel neither requested that the depositions be continued in order for him to view the videotapes, nor did claimant's counsel seek an opportunity to present rebuttal evidence. The videotapes were played and Mr. Recar identified the claimant in the videotapes. During oral argument, claimant's counsel objected to the "opinion testimony" by the witness when commenting on what was contained in the videotapes. The Appeals Board's review of Mr. Recar's testimony does not find any basis for claimant's objections. Accordingly, claimant's objections to the opinions expressed by Mr. Recar, other than in his written reports that were withdrawn and are not a part of the record, are overruled.

Although, claimant's counsel was not present at the deposition of David Lee, he voiced the same objections to Mr. Lee's anticipated testimony during the deposition of Mr. Recar. Mr. Lee testified that he attempted surveillance of claimant on April 23, 1992; April 27, 1992, May 11, 1992, and May 13, 1992. He observed claimant on each of those dates but only took videotapes on three dates. He observed claimant on May 11, 1992, but did not obtain a videotape of his observations. Lee Deposition Exhibit No. 3 is the videotape taken on April 23 and 27, 1992. Lee Deposition Exhibit No. 4 is the videotape taken May 13, 1992. Exhibits No. 3 and No. 4 were offered into evidence by respondent. As claimant's counsel was not present, no simultaneous objection was lodged. However, even if claimant's counsel had lodged the same objections to Lee Deposition Exhibit No. 3 and

No. 4 as he did to Recar Deposition Exhibit Nos. 5, 6 and 7, the result would be the same; that is, the objections would be overruled. The videotapes are admitted. Mr. Lee's testimony, including his identification of claimant on the videotapes, is a part of the record. Exhibit Nos. 1 and 2 were marked during the Lee Deposition but were never offered or introduced.

For the reasons above stated, the Appeals Board finds the claimant's objections to the Administrative Law Judge's consideration of the videotapes to be without merit. The videotapes are admitted and included as a part of the record together with the transcripts of the deposition testimony given by John Recar and David Lee.

(2) Claimant was injured at work on July 9, 1991, when he slid out of a truck landing on a rock with his left foot and twisting his knee. The Administrative Law Judge granted claimant an award of compensation based upon a 40 percent loss of use of the left lower extremity. Claimant argues he is entitled to an award based upon a general body disability because he also suffered a back injury as a result of his altered gait caused by the injury to his knee. Although the Administrative Law Judge indicated in his Award that claimant also injured his hip and low back on July 9, 1991, claimant's counsel clarified during oral argument to the Appeals Board that claimant was not alleging he injured his back in the original accident, but rather that the back condition subsequently developed from his altered gait as a direct and natural result of his knee injury. The back injury first manifested itself about the time claimant was receiving work hardening in October 1992. Claimant also attributes his back pain to the use of a cane which he indicated was made necessary by the knee injury. Claimant's testimony at the regular hearing was that it did not seem like he hurt his back at the time of his fall from the truck. Claimant testified that he started using a cane after the work hardening and that it was about this time that his back started bothering him. According to claimant, he did not have back problems before starting the work hardening. Now his back is bothered by prolonged sitting and walking. Walking also bothers his knee although the knee pain is there all the time.

Claimant was treated by board-certified orthopedic surgeon Edward J. Prostic, M.D., beginning August 13, 1992. Previously, claimant had undergone arthroscopic surgery to repair a degenerative tear of the posterior horn of the medial meniscus and degenerative tearing of the lateral meniscus. Dr. Prostic opined that claimant had obtained an inadequate result from his surgery and was in need of additional medical care. He treated claimant with prescription medication and an injection of cortisone to the knee. He also sent claimant to work hardening. Dr. Prostic last saw claimant on October 12, 1993, at which time he was convinced claimant would need a total knee replacement for pain relief because of his increasing osteoarthritis. However, claimant did not want the surgery at that time. Although his records included a letter from the work-hardening provider that work hardening was being discontinued due to claimant's complaints of knee and back pain, Dr. Prostic had no record and could not recall claimant ever complaining about his back. Work hardening was also discontinued based upon the opinion of Dr. Montgomery that it would be difficult motivating the claimant and he did not expect work hardening to be successful. Dr. Prostic rated claimant as having a 25 percent functional impairment of the leg and opined that were

claimant to undergo a total knee replacement surgery and receive an excellent result, his impairment would be 30 percent. Dr. Prostic noted that the report he received from Dr. Montgomery also referred to claimant as dysfunctional which he understood to mean hypochondriasis, hysteria and/or depression. As of the last time Dr. Prostic saw claimant, he considered claimant capable of performing work that did not require prolonged standing, walking, significant climbing, squatting, kneeling, carrying or heavy lifting. However, if claimant were to have the knee replacement surgery, the restriction against heavy lifting or carrying would remain but the other restrictions would likely be eliminated.

When questioned about the findings by Michael J. Poppa, D.O., concerning claimant's back, Dr. Prostic pointed out that he saw claimant approximately ten months after claimant had been seen by Dr. Poppa and that during this subsequent examination claimant was still not complaining of back pain. Although there was a single incident or report of back pain from the work-hardening program at Baptist Memorial Hospital, the September 14, 1992, report from Baptist stated claimant "really had pretty good motion of his low back and was not complaining of his low back [on] September 14th, 1992." Likewise, the October 2, 1992, assessment from Baptist indicated that claimant's limitations were from his old shoulder injury and from his knee problem and not from his low back. Although Dr. Prostic agreed that claimant could have injured his back from work hardening and altered gait or from the accident itself, Dr. Prostic had no basis for attributing a work-related back injury to claimant as claimant never mentioned back complaints on any of the six occasions that Dr. Prostic saw him.

Claimant was examined at the request of his attorney by Dr. Poppa on January 13, 1993. Claimant told him that during work hardening he aggravated his low back and that the work-hardening program was discontinued for that reason. Dr. Poppa's examination of claimant revealed low back symptoms with a decreased range of motion of the lumbar spine. He also noted claimant walked with altered gait. Low back x-rays revealed osteophytic spurring involving lower lumbar vertebra with facet arthropathy, inflammation and degenerative changes of a chronic nature. Dr. Poppa considered claimant's complaints to be consistent with the x-ray findings. Dr. Poppa related the left knee injury to claimant's work and related claimant's low back condition to the work-conditioning program prescribed for claimant by Dr. Prostic.

Dr. Poppa rated claimant's left lower extremity impairment at 45 percent and his back impairment at 7 percent to the whole body. Using the combined values chart in the (AMA) Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), would result in claimant's impairment being 20.5 percent to the body as a whole. Dr. Poppa considered claimant capable of returning to work with permanent restrictions to avoid kneeling, crawling, squatting, and no lifting greater than 35 pounds on a repetitive basis. He agreed claimant would require a total knee replacement.

Because of the varying opinions, the Administrative Law Judge ordered an independent medical examination to be performed by orthopedic surgeon Fred A. Rice, M.D. His report dated May 17, 1995, is a part of the record. It was Dr. Rice's opinion that

claimant sustained a permanent injury to his left lower extremity which he rated as 40 percent. He also recommended a total arthroplasty. Dr. Rice did not attribute any impairment to claimant's back or hip to his work-related accident. However, this opinion appears to be based upon the fact that claimant's back complaints were not reported until October 1992, some 15 months after claimant's accident. Dr. Rice apparently was not given a history or otherwise understood claimant's allegation to be that the back condition developed subsequent to his accident and as a result of either his treatment or his altered gait. Accordingly, the opinion of Dr. Rice concerning the relationship of claimant's back injury to his work-related accident of July 9, 1991, is of little value.

The Administrative Law Judge found that claimant should be limited to a scheduled injury to his left knee based upon a 40 percent permanent partial loss of use of the left lower extremity under K.S.A. 44-510d. The Administrative Law Judge did not award any compensation for claimant's alleged low back injury. Although claimant could be entitled to benefits for his low back under the Workers Compensation Act if the injury resulted either from treatment for the knee or from the altered gait from the knee injury, such has not been established. Even if the Appeals Board accepted as true the proposition that claimant had back symptoms during work hardening and at the time of his examination by Dr. Poppa, claimant did not complain about his back to Dr. Prostic. Claimant was examined by Dr. Prostic immediately after the work-hardening program and several months after his examination by Dr. Poppa. The back symptoms appear to be intermittent and related to claimant's level of activity. The Appeals Board does not find from the evidence that claimant's back condition is of a chronic and permanent nature or that the claimant would not receive symptomatic relief from the back symptoms were he to undergo the recommended knee joint replacement surgery. As such, the Award by the Administrative Law Judge is affirmed.

(3) The parties agree that the Administrative Law Judge incorrectly calculated the permanent partial disability award by not properly accounting for the temporary total disability compensation paid by respondent. That error will be corrected herein.

However, the parties failed to explain a discrepancy in the number of weeks of temporary total disability compensation paid. There were 66.87 weeks from the date of claimant's accident until the date claimant was released to return to work on October 19, 1992. The record shows claimant went on a brief vacation immediately following his accident and then worked for about a week upon his return. But claimant also testified that he did not work after his injury. Nevertheless, counsel for respondent announced at the Regular Hearing that it had paid 57 weeks of temporary total disability compensation at $289 per week and that it was paid continuous from the date of accident. Claimant's counsel did not dispute the amount and announced there was no claim for additional temporary total disability compensation. During oral argument to the Appeals Board, counsel for the parties agreed with the figures and with the award computation as set forth in respondent's brief to the Appeals Board. Accordingly, those are the figures that will be used for the award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler, dated June 23, 1997, should be, and is hereby modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Louis Shepard, and against the respondent, Overnite Transportation, a qualified self-insured, for an accidental injury which occurred July 9, 1991, and based upon an average weekly wage of $534 for 57 weeks of temporary total disability compensation at the rate of $289 per week or $16,473, followed by 57.2 weeks of permanent partial compensation at the rate of $289 per week or $16,530.80 for a 40% permanent partial disability, making a total award of $33,003.80.

As of December 31, 1997, there is due and owing claimant 57 weeks of temporary total disability compensation at the rate of $289 per week or $16,473, followed by 57.2 weeks of permanent partial compensation at the rate of $289 per week in the sum of $16,530.80 for a total of $33,003.80, which is ordered paid in one lump sum less any amounts previously paid.

The remaining orders entered by the Administrative Law Judge in the Award are adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of December 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George E. Mallon, Kansas City, KS
James E. Martin, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director